MOTION FILED
NOV 27 1996

No. 96-479

(4)

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ADVANCED COMMUNICATIONS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF WILLIAM PHILIP WELTY IN SUPPORT OF PETITIONER

LAWRENCE BERNSTEIN *
BERNSTEIN AND MCVEIGH
1818 N Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 296-1800
Counsel for Amicus Curiae
William Philip Welty

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

29 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-479

ADVANCED COMMUNICATIONS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 37.2(b) of the Rules of the Supreme Court, William Philip Welty hereby moves for leave to file the attached Amicus Curiae Brief in Support of Petitioner.

Petitioner, Respondent and the other parties, except for United States Satellite Broadcasting, Inc. ("USSB") have consented to the filing. USSB has refused to give its consent.

Me. Welty is able to assist the Court by offering relevant matter not otherwise likely to come to the Court's attention. S. Ct. Rule 37.1. Because of his unique knowledge of and long-term experience in the direct broadcast satellite ("DBS") field, Mr. Welty has a perspective shared by few others in this case.

Mr. Welty was the founder, President, Chief Executive Officer and a principal stockholder of DBS permittee Continental Satellite Corporation ("CSC"). CSC is mentioned prominently in this proceeding.

Mr. Welty's participation in CSC terminated in March 1996 following approval by the Federal Communications Commission of a transfer of control of the company. He offers his brief as an interested individual.

Although as CSC's chief officer Mr. Welty has been a vigorous competitor of Petitioner Advanced Communications Corporation ("ACC") for the allocation of scarce DBS facilities, he submits the attached brief because CSC —like ACC—suffered as a result of inconsistent and arbitrary decision making by Respondent FCC in its regulation of DBS. In CSC's case—unlike ACC's—the Commission concedes its lack of diligence and CSC has properly been allowed to continue onward as a permittee.

As detailed in the attached brief, by its own admission the FCC delayed action on CSC's orbital and channel assignment requests for *five years*, only approving them eight days before CSC's construction permit was to expire.* The brief further demonstrates that other DBS permittees were treated nearly as cavalierly by the Commission.

Ironically, the Commission has argued to the D.C. Circuit, and may well argue here, that its extension grants of CSC's and others' construction permits prove that its contemporaneous denial of an ACC extension and the cancellation of ACC's facilities were the product of reasoned decision making, rather than the result of excessive influence by Congress to auction the channels and enrich the Federal Treasury. The facts clearly refute this claim.

Mr. Welty believes that in reclaiming ACC's facilities and then auctioning them off to the highest bidder, the

---

* *Continental Satellite Corp.*, 10 FCC Rcd 10473 (Int'l. Bur. 1995), 11 FCC Rcd 1157 (Int'l. Bur. 1995).

FCC has acted inappropriately and contrary to law. Its sanctions against ACC were arbitrary and capricious; the antithesis of reasoned decision making by an administrative agency. He offers his brief to assist the Court in resolving this important and extraordinary case.

Wherefore, William Philip Welty respectfully moves for leave to file his amicus curiae brief.

Respectfully submitted,

LAWRENCE BERNSTEIN *
BERNSTEIN AND MCVEIGH
1818 N Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 296-1800
Counsel for Amicus Curiae
William Philip Welty

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICUS CURIAE	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	6
I. THE FCC'S HAPHAZARD ADMINISTRATION OF THE DBS SERVICE CONTRIBUTED SIGNIFICANTLY TO THE DELAYS FOR WHICH IT FAULTS ACC; THAT THE AGENCY GRANTED OTHER EXTENSIONS DOES NOT DISPROVE THAT IT SUCCUMBED TO CONGRESSIONAL PRESSURE IN DENYING ACC'S	6
II. THE FCC HAS FAILED TO SHOW THAT "EXTRANEOUS FACTORS" DID NOT INTRUDE INTO THE DECISION MAKERS' "CALCULUS OF CONSIDERATION"	10
III. THE CANCELLATION OF ACC'S CONSTRUCTION PERMIT EXEMPLIFIES "ARBITRARY TREATMENT AMOUNTING TO AN ABUSE OF DISCRETION"	12
CONCLUSION	18
APPENDIX	
Declaration of William P. Welty, M.Div.	1a

TABLE OF AUTHORITIES

Cases Page

Adams Telcom, Inc. v. FCC, 38 F.3d 576 (D.C. Cir. 1994) 16, 17
Advanced Communications Corp., 6 FCC Rcd 2269 (1991) 7
Advanced Communications Corp., 11 FCC Rcd 3399 (1995) ..... *passim*
ATX, Inc. v. United States Dept. of Transp., 41 F.3d 1522 (D.C. Cir. 1994) 5, 10, 11, 12
Burlington Truck Lines v. U.S., 371 U.S. 156 (1962) 8
Columbia Broadcasting System v. FCC, 454 F.2d 1018 (D.C. Cir. 1971) 17, 18
Continental Satellite Corp., 4 FCC Rcd 6292 (1989) 7, 8, 13, 14
Continental Satellite Corp., 5 FCC Rcd 7241 (1990) 13
Continental Satellite Corp., 10 FCC Rcd 10743 (Int'l. Bur. 1995) 4, 8
Continental Satellite Corp., 11 FCC Rcd 1157 (Int'l. Bur. 1995) 7, 8
DBS Systems, 92 FCC 2d 64 (1982) 13
Direct Broadcasting Satellite Corp., DA 95-2439 (Int'l. Bur. Dec. 8, 1995) 7, 9
Direct Broadcast Satellite Service, 90 FCC 2d 676 (1982) 6
Directsat Corp., 10 FCC Rcd 88 (1995) 9, 15
Directsat Corp., 11 FCC Rcd 1775 (Int'l. Bur. 1996) 8, 9, 10, 15, 16, 17
District of Columbia Fed'n of Civic Ass'ns v. Volpe, 459 F.2d 1231 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972) 11
Dominion Video Satellite, Inc., 8 FCC Rcd 6680 (1993) 8, 13, 14, 16, 17
Dominion Video Satellite, Inc., 10 FCC Rcd 12743 (1995) 13
Dominion Video Satellite, Inc., DA 96-541 (Int'l. Bur. April 5, 1996) 15
EchoStar Satellite Corp., 11 FCC Rcd 3017 (Int'l. Bur. 1996) 7, 8, 10

TABLE OF AUTHORITIES—Continued

	Page
Garrett Broadcasting Service v. FCC, 513 F.2d 1056 (D.C. Cir. 1975)	3, 16, 18
Greater Boston Television Corp. v. FCC, 444 F.2d 841 (D.C. Cir. 1970)	16, 18
Green Country Mobilephone, Inc. v. FCC, 765 F.2d 235 (D.C. Cir. 1985)	16, 17
Melody Music, Inc. v. FCC, 345 F.2d 730, (D.C. Cir. 1965)	3, 16, 17, 18
McElroy Elec. Corp. v. FCC, 990 F.2d 1351 (D.C. Cir. 1993)	17
N.L.R.B. v. Metropolitan Life Ins. Co., 380 U.S. 438 (1965)	8
NLRB v. Washington Star Co., 732 F.2d 974 (D.C. Cir. 1984)	17
Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers, 714 F.2d 163 (D.C. Cir. 1983)	11, 12
Revision of Rules and Policies for the Direct Broadcast Satellite Service, 11 FCC Rcd 1297 (1995)	7
Satellite Syndicated Systems, Inc., 99 FCC 2d 1369 (1984)	6
Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194 (1955)	8
Statutory Provision	
47 U.S.C. § 309(j)	4, 8
Regulatory Provisions	
47 C.F.R. § 100.19 (1995)	7
47 C.F.R. § 100.19(b) (1995)	14
Other Authorities	
Public Notice, "SATELLITE POLICY BRANCH INFORMATION: APPLICATIONS ACCEPTED FOR FILING", Report No. SPB-37, Feb. 14, 1996	9
Fleming, *Senator McCain Moves Up*, Broadcasting & Cable (Nov. 11, 1996)	5

TABLE OF AUTHORITIES—Continued

Page

Hundt, Speech to the Artists Rights Foundation (Feb. 15, 1996) 4
Stern, *Hundt Calls Budget Slash "Mistake,"* Broadcasting & Cable (Sept. 11, 1995) 3
Wall St.J. (March 17, 1995) 11

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 96-479

ADVANCED COMMUNICATIONS CORPORATION,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

AMICUS CURIAE BRIEF OF WILLIAM PHILIP WELTY IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

William Philip Welty was the founder, President, Chief Executive Officer and a major shareholder of direct broadcast satellite ("DBS") permittee Continental Satellite Corporation ("CSC"). CSC, which is mentioned throughout this case, has since 1989 been a permittee and a competitor of Petitioner Advanced Communications Corporation ("ACC") for scarce DBS facilities.

Mr. Welty's interest in CSC terminated in March 1996 following Federal Communications Commission approval of a transfer of control of the company. He submits this

brief as an interested individual with firsthand knowledge of DBS and of the difficulties which visionaries like CSC and ACC labored under during the harder times before new digital communications technologies were perfected and entrepreneurs lined up to bid hundreds of millions for the opportunity to build and launch direct broadcast satellite systems.

Mr. Welty (whose Declaration under penalty of perjury is appended hereto) recalls that CSC, like ACC, suffered from the FCC's inattentive regulation of the fledgling DBS service. As is hereinafter shown, the Commission candidly admits that *it* was the principal cause of delays in CSC's—and other permittees'—initiation of their DBS service. The agency inexplicably delayed for years in processing permittees' requests for orbital and channel assignments and so retarded the inauguration of a competitive DBS service. It is ironic that the agency bases its retaking and subsequent auction of ACC's facilities on permittee inaction: for years the biggest roadblock to the startup of DBS was the FCC itself.

Because he competed with ACC for the allocation of DBS facilities, Mr. Welty understands the frustration which ACC, long a determined and innovative DBS pioneer, now experiences as the lone target of a sudden, unjustifiable government course correction. Since he firmly believes that all DBS permittees deserved equal treatment from the FCC, Mr. Welty supports the grant of ACC's Petition for Certiorari.

SUMMARY OF THE ARGUMENT

ACC's brief contains substantial evidence supporting a grant of its Petition. This brief offers additional proof that Respondent FCC's denial of ACC's request to extend its construction permit was not the epitome of reasoned decision making, but resulted instead from intensive pressures imposed on the FCC by Congress to sell off every

available *hertz* of electromagnetic spectrum, to enrich the Federal Treasury during a well-recalled recent period of fiscal turmoil.

There is strong reason to believe that the expectation of significant auction revenues, and the possibility that they might impact favorably on Congress's intensive deliberations over the FCC's budget, played a part in the Commission's unprecedented treatment of ACC. But while the auction of ACC's facilities was a boon to Congressional budgeteers, it was far from the FCC's finest hour.

As the Petition alludes, Respondent's retaking of ACC's DBS facilities, in *Advanced Communications Corp.*, 11 FCC Rcd 3399 (1995) (referred to hereinafter as the "*ACC Decision*"), is so inconsistent with every other DBS ruling, and its rationale so overstated,[1] that it is proper to conclude that the FCC succumbed to Congressional pressure to raise money in order to preserve the agency's regulatory mission.[2]

---

[1] It is black letter law that "agency action cannot stand when it is 'so inconsistent with its precedents as to constitute arbitrary treatment amounting to an abuse of discretion.'" *Garrett Broadcasting Service v. FCC*, 513 F.2d 1056, 1060 (D.C. Cir. 1975) (Citations omitted). The *ACC Decision* is invalid if the Court cannot perceive the relevance of enumerated factual differences in the treatment of similarly situated parties "to the purposes of the Communications Act." *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965). With due respect to the FCC and its late-1995 budgetary quagmire, the agency has not adequately justified the seizure of ACC's facilities.

[2] While this case was before the D.C. Circuit, the FCC sought to minimize the impact of Congress's purse powers on its decision making. The published record speaks for itself. See ACC Petition n.2, and its report of legislators' threats, while the *ACC Decision* was under review, to substantially cut the agency's budget. Chairman Hundt countered by repeatedly dangling before Congress the prospect of ever more billions yet to flow from spectrum auctions, in an effort to protect and defend "this cash cow": the FCC. Stern, *Hundt Calls Budget Slash "Mistake"*, *Broadcasting & Cable*, Sept. 11, 1995, at 18.

As a consequence of this fusillade, the FCC rendered a decision it would not otherwise have made (indeed, had never before made), in apparent contravention of 47 U.S.C. § 309(j), "pulling the plug" on ACC and allowing high bidders to snap up the channels for nearly three-quarters of a billion dollars.[3] Of course the FCC argues vigorously to the contrary: it denies that there is smoke and cannot see any fire.

This brief disproves Respondent's assertion that a series of post-*ACC Decision* DBS extension grants shows that ACC's case was untainted by excess influence. Those cases are not helpful to the FCC.

The Commission exacerbated delays in DBS startup by years of disinterested oversight of the new service. For years the agency was *the* major impediment to permittees desirous of building their systems. It declined—for a number of years in several instances—to make orbital and channel assignments until permits were on the verge of expiration. Absent such assignments the permittees could not proceed. In one of these cases (cited, ironically, by the FCC to demonstrate its good faith in rendering the *ACC Decision*), the Commission admits that for years, *it* lacked due diligence.[4] Yet it found no difficulty shortly afterwards in canceling ACC's permit for its purported delays, disregarding in the process a decade of effort and innovation.

This brief addresses Respondent's argument to the D.C. Circuit that, under established precedent, there is no evidence of undue influence. The FCC argues, based on the number of letters it received from legislators, that it was

---

[3] Then the FCC Chairman gloated over the "colossal sum, 682 million [by one successful bidder] in an auction for the DBS satellite slot. The amount didn't matter at all. Who am I kidding?" Hundt Speech to the Artists Rights Foundation, Feb. 15, 1996 (as prepared for delivery). Petition at 12. The Chairman has neglected to mention, in that address or elsewhere, what the auction cost ACC.

[4] *Continental Satellite Corp.*, 10 FCC Rcd 10743 (Int'l. Bur. 1995).

not pressured. The true test, however, is whether all the "extraneous factors" it confronted "intruded into the calculus of consideration."[5] The Petition glaringly recalls many of these "extraneous factors"; letters to the agency represent only a small part of Congress's muscle-flexing.

Comparison of the *ACC Decision* with other notable contemporaneous DBS rulings helps verify that outside forces collectively impacted on the decision making process.[6] How else to explain the FCC's sudden and radical departure at just that moment from years of consistent, favorable rulings?

The FCC's attempt to distinguish ACC's diligence from that of other permittees who received permit extensions represents final confirmation that the *ACC Decision* is not a paradigm of reasoned decision making. Although ACC did not move hastiily to build its DBS system, neither did anyone else. Until very recently, DBS technology was not sufficiently advanced and investors were unwilling to commit the staggering sums needed to build and launch these unique satellites. A kinder, gentler FCC regularly granted extensions to permittees who proved by their deeds that they meant to keep their words.[7] ACC was surely one of

---

[5] *ATX, Inc. v. United States Dept. of Transp.*, 41 F.3d 1522, 1527 (D.C. Cir. 1994) (Citations omitted.)

[6] Some of these pressures are reflected in continuing Senatorial anger at the *ACC Decision* dissenters, long after the auction had ended. During a June 1996 Senate Commerce Committee oversight hearing, Senator John McCain "cross-examined FCC Commissioner James Quello about Quello's opposition to the FCC decision to reclaim and auction DBS channels once owned by Advanced Communications Corp. 'If you had your way, the taxpayers would have gotten nothing,' McCain said. When Commissioner Quello said that he had no strong opinion either way about the auction, Senator McCain replied: 'I think it's a pretty big deal. Perhaps you don't.'" Fleming, *Senator McCain moves up, Broadcasting & Cable*, Nov. 11, 1996, at 18-19.

[7] *See ACC Decision* (Dissenting Statement of Commissioner Andrew C. Barrett), at 11 FCC Rcd 3435-39.

these and deserves the same chance the others received to see its dreams realized.

As a dissenter sadly remarked, the Commission's justifications for tossing ACC off the DBS playing field are "distinctions without a difference." [8] For these reasons, ACC's Petition should be granted.

ARGUMENT

I. THE FCC'S HAPHAZARD ADMINISTRATION OF THE DBS SERVICE CONTRIBUTED SIGNIFICANTLY TO THE DELAYS FOR WHICH IT FAULTS ACC; THAT THE AGENCY GRANTED OTHER EXTENSIONS DOES NOT DISPROVE THAT IT SUCCUMBED TO CONGRESSIONAL PRESSURE IN DENYING ACC'S.

The *ACC Decision* concludes, in summary, that ACC took too long and accomplished too little. Thus it was shorn of the benefits of 11 years of innovation and accomplishment.

Respondent reached its adverse decision at the very time when, as detailed in the Petition, members of both houses of Congress were publicly clamoring for the FCC to auction off DBS spectrum, newly perceived as being of considerable monetary value, to the highest bidder. Petition at 5-11.[9]

---

[8] *ACC Decision* (Dissenting Statement of Commissioner James H. Quello), at 11 FCC Rcd 3432.

[9] Perceptions about DBS markedly changed with the then-recent launch of the first such satellites and the unexpected popular acceptance.

Although the FCC began regulating DBS in 1982, *Direct Broadcast Satellite Service*, 90 FCC 2d 676 (1982), and ACC received a construction permit in 1984, *Satellite Syndicated Systems, Inc.*, 99 FCC 2d 1369 (1984), no definitive actions were taken during the 1980s to build or launch satellites. That seems to have been acceptable to the FCC, which concedes that for a number of years, DBS was "untried and unproven, both technically and financially." *ACC Decision*, at 11 FCC Rcd 3408. As long as permittees met

Respondent contends all this is but coincidence and that ACC was the cause of its own destruction. To prove that it was untainted by Congressional influence, the FCC argued to the D.C. Circuit that, immediately after the *ACC Decision*, it *granted* extensions to four DBS permittees who were more diligent than ACC. "If [ACC's] theory were correct," it insisted, "the Commission would have denied these extension requests to reclaim additional valuable spectrum for auction. That it did not, and that the Commission in each case carefully distinguished ACC's lack of diligence, demonstrates that the [*ACC Decision*] was properly decided solely on its merits." Brief for Appellee at 42 and n.10.[10]

---

first-tier diligence thresholds per 47 C.F.R. § 100.19 (completing construction contracts within a year of receiving a permit), the agency granted them extensions of time.

In mid-1989, as technology improved and interest in the channels increased, the FCC released a new omnibus order tentatively reissuing DBS permits and announcing new processing standards. *Continental Satellite Corp.*, 4 FCC Rcd 6292 (the *"Continental Order"*). *Inter alia*, the *Continental Order* gave permittees another year to show first-tier diligence by submitting finalized construction contracts, announced its intention to apportion groups of eastern and western "half-CONUS" channel assignments on a "first-come, first-served" basis, and urged parties to combine resources through merger or buy-out. *Id.*, at 4 FCC Rcd 6293, 6299. The FCC now acknowledges that this allocation scheme was counterproductive and that it significantly delayed orbital and channel assignments. *ACC Decision*, at 11 FCC Rcd 3425; *Revision of Rules and Policies for the Direct Broadcast Satellite Service*, 11 FCC Rcd 1297, 1301-02 (1995).

ACC took the *Continental Order* seriously, becoming one of the first DBS permittees to meet first-tier diligence requirements and receiving orbital/channel assignments in late 1991. *Advanced Communications Corp.*, 6 FCC Rcd 2269. Since all those who were less expeditious than ACC in achieving first-tier compliance are still DBS participants, and ACC is not, it may be said that ACC paid a high price for its diligence.

[10] These cases, discussed, *infra*, are: *Continental Satellite Corp.*, 11 FCC Rcd 1157 (Int'l Bur. 1995); *Direct Broadcasting Satellite Corp.*, DA 95-2439 (Int'l. Bur., Dec. 8, 1995); *EchoStar Satellite*

This contention is unsupported by the facts. In none of the four cases could the FCC lawfully "have denied these extension requests to reclaim additional valuable spectrum for auction." Three of the four extensions were in fact necessitated by *the FCC's own prolonged inaction and delay*. Respondent's later emendations to the D.C. Circuit notwithstanding, the cases themselves show that the FCC had no choice consistent with due process but to grant the extensions; *these rulings do not disprove that, as regards ACC, the FCC violated 47 U.S.C. § 309(j).*[11]

In *Continental Satellite Corp.*, the FCC's International Bureau said candidly:

> for the past five years, CSC has been prevented from constructing its satellites by [agency] inaction . . . on its application for orbital/channel assignments. We cannot fault CSC for not having progressed further toward realization of its DBS system during the period it was awaiting government action that was a prerequisite to satellite construction. . . .

11 FCC Rcd at 1157.[12] The Bureau continued, *id.*, that: "[t]he time taken to process due diligence showings in the DBS service effectively deprived CSC of all but eight days of its six-year construction period."[13] Having im-

---

Corp., 11 FCC Rcd 3017 (Int'l. Bur. 1996); and *Directsat Corp.*, 11 FCC Rcd 1775 (Int'l. Bur. 1996).

[11] The Court admonished in *N.L.R.B. v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 444 (1965), that "the integrity of the administration process requires that courts not accept appellate counsel's post hoc rationalizations for agency action. . . ." *citing Burlington Truck Lines v. U.S.*, 371 U.S. 156, 168 (1962); and *Securities & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1955).

[12] It is unrealistic to expect meaningful construction until specific orbital slots and channels are awarded. *Continental Order; Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680 (1993).

[13] *See also Continental Satellite Corp.*, 10 FCC Rcd 10743 (Int'l. Bur. 1995): "[w]e rightly require that our permittees proceed with due diligence. Our permittees are entitled to expect that we will do the same. *In this instance, we have not*" (Emphasis added.)

peded CSC's progress for half a decade, that the Commission did not also let CSC's channels out for competitive bids scarcely entitles it to any credit here.

In *Direct Broadcasting Satellite Corp.* ("DBSC"), the FCC admitted it took *three and a half years* to make a due diligence finding. DA 95-2439, ¶ 4. It finally came less than two years before DBSC's permit was set to expire, leaving the permittee with "less than the time necessary to build a DBS satellite." *Id.*, ¶ 10. Moreover, the extension was "based in large measure upon [the timing of] DBSC's constructon schedule," not on actions it had taken to date. *Id.*, ¶ 9. Diligence, while paid lip service in the ruling, was not a predominant basis for the grant.[14]

In *Directsat Corp.*, it again took the FCC three and a half years (and until less than two years before expiration), to find due diligence and award Directstat orbital and channel assignments. 11 FCC Rcd at 1775.[15] Once again "Commission delays" prevented construction progress. *Id.*, at 1776-77.[16] These equitable factors, and not specific

---

[14] In a Public Notice released February 14, 1996, the International Bureau announced that DBSC was seeking Commission approval to assign its DBS permit and channels to EchoStar. Report No. SPB-37, "SATELLITE POLICY BRANCH INFORMATION: APPLICATIONS ACCEPTED FOR FILING." Thus—unlike ACC—DBSC may be able to sell out for a profit well into its second extension term, to another entity assuming primary responsibility for construction and launch. *Compare ACC Decision*, at 11 FCC Rcd 3414 ¶¶ 39-40, 3422 ¶ 64.

[15] Less than three months later, Directsat also agreed to merge with EchoStar; see previous footnote. This merger was approved by the International Bureau in January 1995. *Directsat Corp.*, 10 FCC Rcd 88.

[16] This order contrasts Directsat's extension grant with the one denied ACC because Directsat's new construction schedule (as implemented by EchoStar) provides for satellite delivery six months before the new extension expires, whereas ACC would not have launched until more than two years after the date specified in its *original* construction schedule. 11 FCC Rcd at 1777. This is a classic "apples and oranges" comparison.

evidence of Directsat's diligence, predominate.[17]

EchoStar, the fourth post-ACC extension which the FCC relies on to disprove charges of undue influence, is arguably the most inapposite of all. EchoStar had virtually finished its satellite construction and needed only the briefest of extensions to meet its already scheduled launch. 11 FCC Rcd at 3018-19. The FCC had no rational choice but to approve it.

None of these four cases lessens even slightly the probability that the *ACC Decision* was the result of Congressional influence, sweetened by the possibility of FCC budget increases if auctions enlarged the Federal Treasury. Petition at 5-11. In three of the cases, Respondent admits that *it* and not the permittees caused the construction delays necessitating an extension. In the fourth, satellite launch was a few months away. In each, *in the only lawful decision it could make,* the FCC granted the extensions. The *ACC Decision* cannot be deemed to be reasoned decision making because the FCC canceled and auctioned off the facilities of just one permittee.

II. THE FCC HAS FAILED TO SHOW THAT "EXTRANEOUS FACTORS" DID NOT INTRUDE INTO THE DECISION MAKERS' "CALCULUS OF CONSIDERATION."

Before the D.C. Circuit, in its Brief for Appellee, at 43-44, Respondent cited *ATX, Inc. v. United States Dept. of Transp., supra,* claiming that no valid evidence exists of improper Congressional influence. *ATX* in fact compels the opposite conclusion.

The Petition, at 5-11, vividly recreates the aura of tension permeating the FCC (and the government gen-

[17] The Order does list actions purportedly taken, payments made and capital raised. 11 FCC Rcd at 1776. By this time, however, it was EchoStar and not Directsat which was performing the due diligence.

erally) during the time the *ACC Decision* was under review. It was a season of gridlock and government shutdowns, of competing partisan proposals to balance the budget, threats to abolish entire departments and agencies, and of the "Contract With America." There were repeated calls to slash the FCC's budget, or to eliminate it altogether. It was not the best of times for the Commissioners, particularly for Chairman Hundt.[18]

Spectrum auctions were widely discussed as an antidote to budgetary problems. Having tasted the *billions* that auctions could add to the Treasury, Congress demanded more. DBS was high on the list of desirable auction candidates and the only DBS spectrum which could possibly be used for the purpose was ACC's. Petition, at 5-11.

In its D.C. Circuit brief, at 43-44, Respondent finesses these vivid realities with a numbers game: fewer legislators wrote the FCC about DBS auctions than had written to the Transportation Department in *ATX*. It therefore follows —says the FCC—that there was no undue influence.

ATX, however, goes much farther than that. Improper influence is not shown merely by counting letters from legislators, but whether, overall, "extraneous factors intruded into the calculus of consideration" of the decision makers. 41 F.3d at 1527, *citing Peter Kiewit Sons' Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163, 170 (D.C. Cir. 1983) (quoting from *District of Columbia Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir.), *cert. denied*, 405 U.S. 1030 (1972)).

An administrative adjudication is invalid if based in whole or part on Congressional pressure; such interference

---

[18] The Petition reports, at n.2, *inter alia*, that Senator Pressler, then Chairman of the Senate Commerce Committee, said he hoped the FCC would simply "wither away." *Wall St.J.*, March 17, 1995, at A1. It is difficult to believe the FCC Commissioners were unmoved by such rhetoric, especially when legislators were demonstrating a willingness to curtail spending by shutting down the government.

frustrates the right to due process of law. *ATX*, at 41 F.3d 1527 (Citations omitted.) In the administrative process, "the proper focus is not on the content of Congressional communications in the abstract, but rather upon the relation between the communications and the adjudicator's decisionmaking process." *Kiewit*, at 714 F.2d 169-170. Damage is done when Congressional influence shapes the agency's determination on the merits. *ATX*, at 41 F.3d 1528-29.

That Congress pressured the FCC to auction ACC's channels is undeniable; the FCC cannot say otherwise.[19] That the pressure included threats to drastically cut the FCC's operating budget or eliminate the agency altogether is also an established fact. These threats made to the FCC decision makers affected their decision making. The *ACC Decision* is the end result.

If it is shown that the *ACC Decision* departs unreasonably from previous FCC decisions, the conclusion is inescapable that "extraneous factors intruded into the calculus of consideration" of the FCC decision makers; *ATX*. The *ACC Decision* is therefore invalid.

III. THE CANCELLATION OF ACC'S CONSTRUCTION PERMIT EXEMPLIFIES "ARBITRARY TREATMENT AMOUNTING TO AN ABUSE OF DISCRETION."

Respondent will insist here as it has below that in denying ACC's extension request, it was not changing the rules of the game. That claim is dubious on its face, since the Commission has granted all other such extension requests and the disparate *ACC Decision* was rendered during the tumultous time described above and in the Petition, at 5-11.

---

[19] The pressure was powerfully abetted by one prospective participant's announcement that it would open the bidding at $175 million.

Respondent insists that the *ACC Decision* is in *full accord* with its other decisions. Brief for Appellee at 26-36. Close scrutiny, however, of two other notable FCC extension rulings shows that the *ACC Decision* is not the icon of consistency the Commission contends it is.

Dominion Video.[20] Dominion received one of the first DBS construction permits, in 1982.[21] Over the next seven years, Dominion completely changed its proposal around and substituted satellite contractors; then it sought an extension of time to construct. 8 FCC Rcd at 6680-81.

The *Continental Order* (n.9, *supra*) tentatively awarded Dominion eight pairs of easterly and westerly "half-CONUS" channels. Dominion promptly appealed, arguing that it was entitled to more.[22] Four months later, Dominion proposed a reconfiguration of its system. It proffered still another reconfiguration nine months afterwards. *Id.*, at 6682.

Dominion's maneuverings over the next two years are detailed at 8 FCC Rcd 6682-85; the FCC does not pretend that ACC did anything comparable.[23] Gently put,

---

[20] *Dominion Video Satellite, Inc.*, 8 FCC Rcd 6680 (1993), *recon. denied*, 10 FCC Rcd 12743 (1995). Compare the FCC's surprisingly terse analysis of this troublesome case in its Brief for Appellee at 33-34.

[21] *DBS Systems*, 92 FCC 2d 64 (1982).

[22] The appeal was denied in *Continental Satellite Corp.*, 5 FCC Rcd 7241 (1990).

[23] For example, Dominion submitted different specifications or configurations four different times: in filings made October 13, 1989, July 5, 1990, January 13, 1991 and September 18, 1991. At least three staff requests for information went unanswered. As of December 18, 1991 (when frustrated FCC staff temporarily canceled Dominion's permit), more than 28 months had elapsed since the *Continental Order* imposed a first-tier diligence deadline of 12 months. At that point and even afterwards, numerous essential elements of Dominion's contract were not finalized. 8 FCC Rcd at 6686-87. Nevertheless, when Dominion proffered a completed con-

Dominion demonstrated little diligence, not submitting a completed contract for over two and a half years. 8 FCC Rcd at 6685. It did not approach compliance with either the *Continental Order* or 47 C.F.R. § 100.19(b).[24]

For its extended nonfeasance, Dominion did not suffer the loss of its permit. The FCC rescinded Dominion's orbital and channel assignments and put it at the back of the first-come, first-served permittee queue. 8 FCC Rcd at 6687. In simultaneously granting Dominion's second extension request, the Commission found it had "encountered some difficulties beyond its control," but that when balanced against Dominion's "significant efforts" on behalf of its system: entering into agreements for "launch services and home receiving equipment," developing a financing plan and conducting research, the "totality of the circumstances" merited a four-year permit extension. *Id.*[25] [26]

---

tract months later, its permit was promptly *reinstated*. *Id.* Assuming *arguendo* the factual accuracy of the *ACC Decision*, ACC's purported inactions, which resulted in the cancellation of its permit, pale before Dominion's, which did not.

[24] *Compare ACC Decision*, at 11 FCC Rcd 3408 and n.38, and Respondent's assurance that it repeatedly "stripped" applicants of their permits for noncompliance with the first diligence tier. Not so Dominion, which remains a permittee today. Indeed, during all of the 1990s only ACC has been denied an extension.

[25] None of these actions, however, represents "any concrete progress towards the actual construction and operation of [Dominion's] DBS system." *ACC Decision*, at 11 FCC Rcd 3414. The actions which the *ACC Decision* attributes to ACC but finds insufficient to merit extension, seem very similar: "(1) the promotion of digital transmission technology; (2) the development of plans to provide educational programming; (3) advocacy of interactive service by DBS systems; and (4) participation in legislative, regulatory and publicity efforts to promote the development of DBS." *Id.*, at 3412.

[26] Dominion has since continued to try and alter its DBS proposal. On November 20, 1995, it sought to exchange two of its

Directsat.[27] In January 1995 the FCC approved a for-profit sale (contrary to its established policies) of Directstat's DBS facilities to EchoStar. It ruled that "economies of scale" in such consolidations provide "a greater likelihood of competing effectively in this emerging service. . . ." 10 FCC Rcd at 89.[28] Several months later the FCC granted Directsat's second extension request, based on construction progress by the company, now operated by EchoStar. 11 FCC Rcd 1775.

As FCC Commissioner Quello remarks in his *ACC Decision* Dissent, at 11 FCC Rcd 3433, in decisively contrasting Directstat's diligence with ACC's the majority distorts the facts: when the respective Directsat and ACC assignment requests were filed, Directsat had funded only 0.13% of its contract price but was found to be diligent; "whereas [ACC's] payments . . . were deficient because they amounted to less than one percent of the contract price."

Furthermore, while crediting Directsat for satellites to be built and funds to be provided by its purchaser EchoStar, the *ACC Decision* declined to similarly credit ACC, which was guaranteed comparable assistance by purchaser Tempo DBS, Inc. 11 FCC Rcd at 3433-34 (Quello Dissent.) These and other disparities were aptly labeled "distinctions without a difference." *Id.*, at 3432.

Reasoned Decision Making. Respondent insists that the *ACC Decision* does not represent a change of FCC policy, but instead reflects "the application of the same principles to the significantly different conduct of the permittees

---

westerly channels for two unassigned easterly channels. The request was denied. *Dominion Video Satellite, Inc.*, DA 96-541 (Int'l. Bur., April 5, 1996).

[27] *Directsat Corporation*, 10 FCC Rcd 88 (1995), 11 RR 2d 1775 (Int'l. Bur. 1996). Compare Respondent's analysis in its Brief for Appellee at 30-33.

[28] Shortly thereafter, in the *ACC Decision*, the Commission viewed ACC's proposed consolidation with permittee Tempo DBS, Inc. less beneficently.

[i.e., ACC and all others] during the first extension period." Brief for Appellee at 34. The *Dominion* and *Directsat* cases refute that claim; all the DBS extensions contemporaneously granted by the FCC collectively devastate it.[20]

On the facts and the law, it is impossible to square Respondent's treatment of ACC and the other similarly situated extension applicants. Each of these visionary and hard-working permittees deserved an extension of time for their generally comparable efforts; all but one of them received it. However the FCC may strain to characterize this case, the *ACC Decision* marks a sea change from the agency's previously consistent treatment of DBS permittees.

While dispositions may evolve over time,

> an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored . . . and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute. . . .

Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970); *Garrett Broadcasting Service v. FCC, supra, Melody Music, Inc. v. FCC, supra.* Respondent asserts that the *ACC Decision's* 180-degree swerve does not constitute a change of policy; the facts—and the consequences—prove contrarily.

An agency's obligation to justify dissimilar treatment of similar parties is greater where new policies or emerging technologies are involved. *Green Country Mobilephone, Inc.; Adams Telcom, Inc. v. FCC*, 38 F.3d 576 (D.C. Cir.

---

[20] Although an agency's failure to waive a rule will not be overturned unless its reasons are "so insubstantial as to render that denial an abuse of discretion," that heavy burden "is carried when an agency arbitrarily waives a deadline in one case but not in another." *Green Country Mobilephone, Inc. v. FCC*, 765 F.2d 235, 238 (D.C. Cir. 1985).

1994). "[J]udicial vigilance to enforce the rule of law in the administrative process is particularly crucial where, as here, the area under consideration is in a constant state of flux." *Columbia Broadcasting System v. FCC*, 454 F.2d 1018, 1025-26 (D.C. Cir. 1971) (Citation omitted.)[20]

It is settled that a reviewing court

> will not second-guess a reasoned determination by an agency that the advantages of rigidity outweigh the disadvantages in a given procedural circumstance. *See NLRB v. Washington Star Co.*, 732 F.2d 974, 977 D.C. Cir. 1984). On the other hand, once an agency agrees to allow exceptions to a rule it must provide a rational explanation if it later refuses to allow exceptions in cases that appear similar. A sometimes-yes, sometimes-no, sometimes-maybe policy . . . cannot . . . be squared with our obligation to preclude arbitrary and capricious management of [the agency's] mandate.

Green Country Mobilephone, at 765 F.2d 237.

---

[20] *Green Country* concerned FCC procedural rules for cellular radio, then a new technology. The agency had refused to accept new cellular applications after the close of the filing deadline, but had accepted even less timely broadcast applications. The D.C. Circuit reversed, stating that: "[w]e cannot quarrel with the validity of the Commission's concerns. We reverse the Commission not because the strict rule it applied is inherently invalid, but because the Commission has invoked the rule inconsistently. We find that the Commission has not treated similar cases similarly." 765 F.2d at 287.

Adams Telcom involved disparate FCC treatment of applicants under its "pioneer's preference" rules, intended to reward those who develop new services or technologies. The agency summarily dismissed 15 applications as deficient, but had earlier accepted a number of comparable applications for notice and comment. The D.C. Circuit, citing *Melody Music* and *McElroy Elec. Corp. v. FCC*, 990 F.2d 1351 (D.C. Cir. 1993), found that this was error: the Commission had neither "enumerated factual differences, if any, between appellant and the other cases . . . [nor] explained the relevance of those differences to the purposes of the Communications Act." 38 F.3d at 581.

As the *Dominion* and *Directsat* analyses amplify, ACC was at least as diligent as Directsat—*and far more diligent than Dominion*—in moving to build its system. Dominion and Directstat, however, were allowed to participate in the now highly-prized DBS arena and, on grounds which seem *de minimis*, ACC was not. These disparate decisions are " 'so inconsistent . . . as to constitute arbitrary treatment amounting to an abuse of discretion.' " *Garrett Broadcasting Service*, at 513 F.2d 1060.

The *ACC Decision* represents a profound change of FCC policy. But Respondent has been unable (indeed, has declined) to "supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored," *Greater Boston Television Corp.*, at 444 F.2d 852; and has not explained the relevance of enumerated factual differences to the purposes of the Communications Act, *Melody Music*, at 345 F.2d 733. Thus, the *ACC Decision* "cross[es] the line from the tolerably terse to the intolerably mute." *Greater Boston*, at 444 F.2d 852. Respondent's "utter failure to come to grips with this problem constitutes an inexcusable departure from the essential requirement of reasoned decision making." *Columbia Broadcasting System*, at 454 F.2d 1027. For all these reasons, the *ACC Decision* "cannot stand." *Garrett Broadcasting Service*, at 513 F.2d 1060.

CONCLUSION

Wherefore, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

LAWRENCE BERNSTEIN *
BERNSTEIN AND MCVEIGH
1818 N Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 296-1800
Counsel for Amicus Curiae
William Philip Welty

* Counsel of Record

APPENDIX

APPENDIX

DECLARATION OF WILLIAM P. WELTY, M.DIV.

My name is William Philip Welty. I am over the age of eighteen and I am a resident of the State of Nevada. I am not a party to Petitioner Advanced Communications Corporation's ("ACC") actions, either before this Court or before the Federal Communications Commission ("FCC").

I was one of the principal founders of Continental Satellite Corporation, a California corporation ("CSC"). In the Fall of 1986, on behalf of CSC I submitted an application before the FCC for authority to design, construct, launch, and operate a high-powered Direct Broadcast Satellite ("DBS") telecommunications system. As part of the fifth-round of Part 100 filings, the FCC awarded a conditional construction permit to CSC in August 1989. That permit was renewed by the FCC only one week before it was due to expire in August 1995.

During my tenure with CSC, I met and became acquainted with Dan Garner, the founder of then-DBS permittee ACC. My professional relationship with Mr. Garner remained that of a competitor in the nascent DBS industry until I retired from full-time participation in the DBS industry in March 1996 following an FCC-approved transfer of stock holdings in CSC.

REASON FOR FILING THIS AMICUS BRIEF

Even though I have been a business competitor of ACC, I was motivated to file the within AMICUS BRIEF IN SUPPORT OF PETITIONER primarily due to my commitment to see that the interests of justice are met. I have no personal or financial stake in the outcome of these proceedings other than the interests of justice.

The purpose of the instant *amicus brief* is to request that this Court grant ACC's Petition for a Writ of Certiorari. Furthermore, I ask that after agreeing to grant

ACC's Petition, the Court reverse the FCC's unjust order. As part of this reversal, I ask that this Court also order that the FCC reinstate ACC's channel assignments and order that the FCC hold ACC in due diligence so that, should he wish to do so, Mr. Garner can make arrangements either to sell ACC's permit himself or to proceed to orbit with his own DBS system utilizing a strategic partner of his own choice.

I declare under penalty of perjury this 20th day of November, 1996, that the preceding statements are true and correct to the best of my knowledge and belief.

/s/ William Philip Welty
WILLIAM PHILIP WELTY
Founder
Continental Satellite Corporation